

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001253-MR

LARRY MORRISON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 16-CR-00137

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

MAZE, JUDGE: Larry Morrison appeals from a judgment of conviction by the McCracken Circuit Court following a conditional guilty plea pursuant to RCr¹ 8.09. He argues that the trial court erred by denying his motion to suppress

¹ Kentucky Rules of Criminal Procedure.

evidence seized during warrantless searches of his person and vehicle. While we agree with the trial court that the search of Morrison's person was supported by probable cause, we must conclude that the officers lacked probable cause to search his vehicle. Hence, we affirm in part, reverse in part, and remand for further proceedings.

On March 18, 2016, a McCracken County grand jury returned an indictment charging Larry Morrison with one count each of: first-degree possession of a controlled substance (methamphetamine), third or greater offense; possession of a handgun by a convicted felon; possession of synthetic cannabinoid agonists or piperazines; possession of drug paraphernalia; and being a persistent felony offender in the first degree (PFO I). Prior to trial, Morrison filed a motion to suppress evidence seized during a warrantless search of his person and vehicle. The evidentiary hearing on the motion established the following facts.

The seizures at issue occurred on February 10, 2016. The McCracken County Sheriff's Department was executing a search warrant on a residence located at 145 Cedar Avenue. The warrant authorized a search of the house and its residents for drug activity, but it did not mention any involvement by Morrison or his vehicle. As the officers were arriving to serve the warrant, they observed a truck being driven by Morrison pull up on the side of the residence. Detective Ryan Norman saw Morrison get out of the vehicle and walk toward the residence.

As Detective Norman approached, he saw Morrison carrying a bag in his hand. Detective Norman stated that he immediately recognized the substance in the bag as “Moon Walk,” a synthetic marijuana product. In fact, the bag had a prominent label identifying it as “Moon Walk,” and further advising, “not for human consumption.” Detective Norman testified that the label was a ploy by the manufacturer to skirt the law.

Detective Norman further testified that possession of synthetic marijuana is a misdemeanor, and that he was authorized either to cite or to arrest Morrison for possessing it. Based upon finding the synthetic marijuana, Detective Norman proceeded to search Morrison. During the search, he found two grams of methamphetamine in Morrison’s front shirt pocket. Detective Norman also found a package of cigarillos and cash elsewhere on Morrison. Detective Norman then took the keys to Morrison’s truck and directed other officers to search the vehicle. During the search, officers found a set of digital scales, a loaded handgun, a stun gun, and a set of handcuffs.

In his testimony, Morrison admitted to possessing the methamphetamine, but denied possessing synthetic marijuana. He stated that he believed “Moon Walk” was a potpourri. He further testified that the officers held him in the house for a while before they searched his truck. He also stated that he saw the officers walk a drug dog around his truck, and the dog did not alert or bark.

At the close of proof, the Commonwealth argued that Morrison's open possession of synthetic marijuana established probable cause to arrest and search him. The Commonwealth further argued that his possession of the marijuana and methamphetamine established probable cause for the search of his vehicle. The trial court agreed and denied Morrison's motion to suppress. Thereafter, Morrison entered a conditional guilty plea to all charges, except the PFO I count, which was dismissed. Pursuant to the Commonwealth's recommendation, the trial court sentenced Morrison to a total of eight years' imprisonment. This appeal followed.

RCr 8.27 sets out the procedure for conducting a suppression hearing. When the trial court conducts a hearing, our standard of review is two-fold. "First, the factual findings of the court are conclusive if they are supported by substantial evidence [;]" and second, this Court conducts "a *de novo* review to determine whether the [trial] court's decision is correct as a matter of law." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000), citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

As a general rule, warrantless searches are unreasonable *per se*, "subject only to a few specifically established and well-delineated exceptions." *Helphenstine v. Commonwealth*, 423 S.W.3d 708, 714 (Ky. 2014), quoting *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In this case, the trial court found Morrison's open possession of synthetic marijuana provided sufficient probable cause to search Morrison. We first conclude that Detective

Norman had probable cause to arrest Morrison for possession of synthetic marijuana, and to conduct a search incident to that arrest. Probable cause for arrest occurs when “a reasonable officer could conclude from all the facts and circumstances that an offense is being committed in his presence.”

Commonwealth v. Fields, 194 S.W.3d 255, 258 (Ky. 2006). Likewise, KRS² 431.005 authorizes a police officer to arrest a person, “without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence.”

The parties agree that possession of synthetic marijuana was a Class B misdemeanor.³ Morrison argues that KRS 431.015 required Detective Norman to issue him a citation for the misdemeanor instead of making an arrest. Since none of the exceptions listed in KRS 431.015 apply,⁴ Morrison argues that Officer

² Kentucky Revised Statutes.

³ Morrison was charged with possession of synthetic cannabinoid agonists or piperazines under KRS 218A.1427. However, that section was repealed in 2012, and replaced with KRS 218A.1430, which sets out the offense of possession of synthetic drugs. 2012 *Ky. Laws* Ch. 108, § 1. Synthetic cannabinoids or piperazines are included within the definition of “synthetic drugs.” KRS 218A.010(52). At the time of Morrison’s arrest, possession of synthetic drugs was a Class B misdemeanor, but the maximum term of incarceration limited to “no greater than thirty (30) days.” KRS 218A.1430(2)(b). In his guilty plea, Morrison agreed to a sentence of 90 days under the prior statute, and he does not challenge the charge or the sentence on appeal. Thus, the Commonwealth’s mistaken charge under the prior statute is not controlling for purposes of this appeal. In 2016, the General Assembly amended KRS 218A.1430 to designate the offense as a class A misdemeanor for the first offense, and a class D felony for each subsequent offense. 2016 *Ky. Laws* Ch. 135 § 9 (2)(b).

⁴ KRS 431.015 lists those exceptions as follows:

(1)...

(b) A peace officer may make an arrest instead of issuing a citation for a misdemeanor committed in his or her presence if the misdemeanor is:

1. A violation of KRS Chapter 508, 510, or 527, or KRS 189A.010, 511.050, 511.085, 514.110, or 523.110;
2. An offense in which the defendant poses a risk of danger to himself, herself, or another person; or

Norman was not authorized to arrest him, or to conduct a search incident to that arrest.

The Commonwealth concedes that KRS 431.015 required Officer Norman to issue a citation, and it does not argue that any of the exceptions are applicable to this case. Nevertheless, the Commonwealth responds that the statute does not establish a constitutional requirement which would compel suppression of evidence seized in this case. We agree.

In *Virginia v. Moore*, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008), the United States Supreme Court considered the effect of a similar statute on the constitutionality of a misdemeanor arrest made in violation of a state statute requiring a citation. The Court held that the arrest did not violate the United States Constitution, concluding “that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they

3. An offense in which the defendant refuses to follow the peace officer's reasonable instructions.

(c) A peace officer shall make an arrest for violations of protective orders issued pursuant to KRS 403.715 to 403.785 or an order of protection as defined in KRS 456.010.

(d) A peace officer may make an arrest or may issue a citation for a violation of KRS 508.030 which occurs in a hospital pursuant to KRS 431.005(1)(f).

(2) A peace officer may issue a citation instead of making an arrest for a violation committed in his or her presence but may not make a physical arrest unless there are reasonable grounds to believe that the defendant, if a citation is issued, will not appear at the designated time or unless the offense charged is a violation of KRS 189.223, 189.290, 189.393, 189.520, 189.580, 235.240, 281.600, 511.080, or 525.070 committed in his or her presence or a violation of KRS 189A.010, not committed in his or her presence, for which an arrest without a warrant is permitted under KRS 431.005(1)(e).

desire, state restrictions do not alter the Fourth Amendment's protections." *Id.* at 176. Although KRS 431.015 would have required Detective Norman to issue a citation to Morrison, we conclude that his violation of that statute does not compel suppression of items seized from Morrison's person pursuant to an arrest based on probable cause. Therefore, the trial court properly denied the motion to suppress the methamphetamine.

The more difficult question concerns Morrison's motion to suppress items found during the search of his truck. The Commonwealth does not argue that the police had probable cause to search Morrison's truck incident to his arrest under either of the prongs set out in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). But the Commonwealth correctly notes that the "automobile exception" to the warrant requirement permits a warrantless search even when the vehicle's owners or occupants have been detained. This exception "applies when there is probable cause to believe an automobile contains evidence of criminal activity and the automobile is readily mobile." *Chavies v. Commonwealth*, 354 S.W.3d 103, 110 (Ky. 2011). The Commonwealth bears the burden of proving entitlement to the exception. See *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky. 2006).

Morrison contends that there was a factual issue whether the officers delayed searching his truck after he was arrested. However, the mobility of an automobile is considered an exigent circumstance *per se*, even when the occupants

are taken into custody. *Chavies*, 354 S.W.3d at 111, citing *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982), *Florida v. Meyers*, 466 U.S. 380, 104 S. Ct. 1852, 80 L. Ed. 2d 381 (1984)), and *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Thus, the alleged delay in searching the vehicle is not controlling to the inquiry.

Nevertheless, the officers must still have probable cause to believe that the automobile contains evidence of criminal activity. As a basis for searching the truck, Detective Norman relied upon Morrison's presence at the scene of a search, and his possession of synthetic marijuana and methamphetamine. The trial court concluded that this evidence provided sufficient probable cause to search the automobile.

However, Detective Norman's testimony only related to what was found on Morrison. He did not give any additional reasons why he believed that Morrison's truck contained evidence of criminal activity. Detective Norman did not testify to any information which the police possessed connecting Morrison to the criminal activity in the house. Furthermore, he did not testify regarding any other information that the vehicle might have contained evidence of criminal activity, such as a tip from a confidential informant or items in plain view. And even discounting Morrison's testimony about the dog sniff, Detective Norman did not mention that the police brought in a drug dog prior to the search of the truck.

While our standard of review is deferential, we cannot say that a person's mere possession of small quantities of controlled substances automatically establishes probable cause for a search of that person's vehicle. Under the automobile exception to the warrant requirement, "the search otherwise [must be such] as the magistrate could authorize." *Ross, supra* at 823, 102 S. Ct. at 2172. Here, the evidence presented at the suppression hearing did not include any facts supporting the officer's conclusion that Morrison's truck contained evidence of criminal activity.

However, we note that the evidence found in the vehicle may still be admissible under a different exception to the warrant requirement. The "inevitable discovery rule" permits admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002), citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377 (1984). Since Morrison had already been placed under arrest, the evidence could have been found during an inventory search of the truck if it was subject to impoundment.

However, these are factual questions which are beyond the scope of this Court's review. Based on the record before us, we must set aside the trial court's order denying Morrison's motion to suppress evidence seized during the

search of his truck. If there are other grounds for admission of that evidence, the Commonwealth must raise those grounds during the proceedings on remand.

Accordingly, we affirm the order of the McCracken Circuit Court denying Morrison's motion to suppress evidence seized from his person, but we reverse the denial of the motion with respect to the evidence seized during the warrantless search of his vehicle. This matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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